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In the Supreme Court of the United States

OCTOBER TERM

No. A-293

RICHARD W. BOTHMAN, as Chief Probation Officer, Santa Clara County Superior Court, Juvenile Division; *ex rel,* PHILLIP B., a minor,

Petitioner,

vs.

WARREN B. and PATRICIA B.,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

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Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, First Appellate District, Division Four, entered in the case of *"In re Phillip B.,* a person coming under the Juvenile Court Law," entered on May 8, 1979.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, is attached hereto as Appendix A and is reported at 92 Cal.App. 3d 796; 156 Cal.Rptr. 48. The modification of the opinion upon denial of a petition for rehearing is attached hereto as Appendix B and is reported at 93 Cal.App.3d 1010(l). The notification by the Clerk of the California Supreme Court that a petition for hearing was denied is attached hereto as Appendix C and is not reported.

JURISDICTION

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, was filed on May 8, 1979. Upon denial of a petition for rehearing, that opinion was modified on June 7, 1979. A petition for hearing before the California Supreme Court was denied on July 19, 1979. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

I. Has a minor, in a proceeding to provide him life-saving cardiac surgery over his parents' objection, been denied the equal protection of California law, as guaranteed by the Fourteenth Amendment to the United States Constitution, where the Juvenile Court applied a higher standard of proof to the showing made on his behalf than our law requires?

II. Has a developmentally disabled child been accorded fundamental fairness and the requisite due process of law when the Juvenile Court, in proceedings to provide life-saving cardiac surgery over his parents' objections, improperly receives evidence on the quality of the life the minor will lead after surgery?

STATUTE INVOLVED

This petition concerns proceedings under California Welfare and Institutions Code section 300(b) which is set forth in Appendix D.

STATEMENT OF THE CASE

Richard W. Bothman, as Chief Probation Officer for the Santa Clara County Superior Court, Juvenile Division, filed a petition on February 17, 1978, alleging that Phillip B. came within the provisions of section 300(b) of the California Welfare and Institutions Code because he had not been provided with the necessities of life. The minor's parents contested the petition and a hearing was held on April 27, 1978. At the close of that hearing the juvenile court dismissed the petition and a notice of appeal was filed.

By opinion filed May 8, 1979, the Court of Appeal of the State of California for the First Appellate District, Division Four, affirmed the juvenile court order dismissing the petition. On petition for rehearing the opinion was modified on June 7, 1979, and rehearing denied. The petition for hearing was denied by the California Supreme Court on July 19, 1979.

This petition for certiorari is filed within 90 days of the California Supreme Court's denial of the petition for hearing. See Title 28, United States Code section 2101(c); Supreme Court Rule 22(3).

STATEMENT OF FACTS

The petition alleged that Phillip B. was a minor afflicted with Down's Syndrome who was also suffering from a congenital heart defect which greatly reduced his life expectancy. Although the defect could be remedied surgically,

permitting the minor to enjoy a normal life span, his parents refused to consent to the surgery.

Phillip was examined by Dr. Gathman, a pediatric cardiologist, in 1973 for an evaluation of his cardiac problem. He was diagnosed as having a ventricular septal defect, a hole between the two major pumping chambers of the heart, and elevated pulmonary artery pressure which is normally associated with a large septal defect.[1] At that time Dr. Gathman recommended cardiac catheterization to further define the anatomy and dynamics of Phillip's condition but his parents refused to consent to this procedure.

In 1977 Phillip was again referred to Dr. Gathman for an evaluation and a cardiac catheterization was performed. Dr. Gathman reviewed his findings with Phillip's parents and recommended surgical correction of the septal defect. Dr. Gathman does not recommend this surgery for severely retarded children, those with I.Q.'s less than 30, but only where there is a chance the child can function in a relatively controlled environment and have a reasonable life. The operation posed a three to five percent risk which is regarded as low for cardiac surgery. Because of the progressive nature of the damage to the blood vessels in the lungs, delay will increase the operative risk.[2] Dr. French, a member of the faculty at Stanford University Medical School who specializes in pediatric cardiology, examined Phillip on referral from Dr. Gathman. In his opinion his ventricular septal defect can be corrected with reasonable surgical risk.

1. Because of the size of the septal defect the blood pressure in both of Phillip's ventricles is approximately the same. Thus, high pressure blood is admitted into his lungs damaging the vessels therein causing a condition called "pulmonary vascular disease" which is a progressive condition that eventually will lead to an early death. As the blood vessels in the lungs are damaged the flow through them is restricted until eventually unoxygenated blood flows through the septal defect causing the victim to die from the lack of oxygenated blood. As the disease progresses the victim experiences shortness of breath and is ultimately limited to a bed-to-chair existence.

2. This progression is usually rapid during the teenage years and Phillip was thirteen last Tuesday.

Phillip's pulmonary vessels have already undergone some change from the elevated pulmonary artery pressure caused by his ventricular septal defect. If the defect is repaired these changes were expected to reverse; however, without the operation these changes will progress until they severely incapacitate Phillip. The prognosis, without surgery, is that he will begin to do less physically until he will be almost totally incapacitated; he will be very short of breath with any exertion and may even be short of breath at rest; he will suffer periods of feeling faint and may actually pass out; he will be subject to headaches, chest pains, and bleeding through the lungs.

Phillip presents a slightly greater surgical risk than the average case because he is a Down's Syndrome child and has already undergone some pulmonary vascular changes. Dr. French estimated his mortality risk as between five and ten percent. The risk of complications after the operation, such as infections or prolonged hospital stay, are also slightly higher because Phillip is a Down's child. Without the operation Phillip's life expectancy ranges between a few years to fifteen or twenty. His life expectancy if the operation is performed would be the same as an otherwise normal child of his age.

If Phillip did not suffer from Down's Syndrome, Dr. French would recommend the operation and could not remember a case of a Down's Syndrome child with a similar heart problem who had been denied the operation. He has recommended against this surgery only in cases where the children are so severely damaged intellectually, or their

central nervous system is so damaged, that they are virtually unable to function.

Without the operation Phillip's pulmonary vessels will ultimately become so damaged that the septal defect cannot be corrected without killing him. In the doctor's opinion complications from the surgery will probably increase over the next one or two years.

Phillip's teacher, Elizabeth Betten, testified that Phillip is able to write his name in manuscript, his motor-sensory manual skills and his visual perception are very good. He is able to dress himself completely, count through twelve and can identify the numbers through twelve when they are mixed up. He is able to work at one of the top levels in the motor-integration area for his age. Phillip remembers the names of people and can find his way to any room in his school by the name of the teacher.

Mrs. Denman, a school psychologist for Santa Clara County, interviewed Phillip. From her observations and his test scores she concluded that Phillip is a high-functionally mentally retarded child with an I.Q. between 30 and 50. The prognosis for his adult placement would be in a shelter workshop because of his fine motor skills and hand strength. He also has an excellent memory for recent occurrences.

Jean Haight is a program coordinator at Schnuhr's nursery home where Phillip has resided since 1972. Phillip helps with the cho. es at the nursery. He is responsible for his own area, makes his bed, dresses and feeds himself and helps clear the table. He helps the staff fold the laundry, put away groceries and feeds the cat. He belongs to a boy scout troup and spent weekends with a family outside the nursery.

Vickie Holt is the county probation officer assigned to investigate Phillip's case. She had a meeting with Phillip's parents in January of 1978 to discuss the surgical repair of Phillip's heart defect. The parents, who opposed the surgery, expressed their concern that if Phillip outlived them he would become a burden on other members of their family and would not be provided with adequate care.

Opposition Evidence

In opposition to the petition Phillip's parents testified and two exhibits were admitted; a letter from Dr. Hartzel and his report on Phillip's condition. In Dr. Hartzel's opinion Phillip can be expected to make some progress in learning but will always need to be under the care of a supervisor whether in a state hospital or sheltered boarding house. He concluded,

> "By his simple and innocent nature, he would be a natural victim to anyone in the community who might take advantage of him by his trust or by taking his money. It is difficult for these individuals to fit into modern suburban society and, in my experience, they are isolated and rejected.
>
> "I therefore feel that the Beckers are completely justified in refusing to have risky cardiac surgery done on Phillip with the goal of increasing his life expectancy of a life I consider devoid of those qualities which give it human dignity."

Realizing that at some point all Down's children must ultimately be institutionalized, the Beckers decided it was best to put Phillip in a residential care facility directly from the hospital where he was born. When Phillip was an infant they visited him quite regularly, and had to move him from one home when the environment there deterio-

rated; however, now that they are confident he is receiving good care they do not visit as often.

In 1973 the County Health Department advised them of Phillip's heart condition and recommended surgery. They declined feeling it was not in Phillip's best interest. When Dr. Gathman again suggested the operation in 1977, they considered the matter for several weeks but again decided not to consent to the operation. They reasoned that so long as they live they can see that Phillip is well cared; but, if he survives them, living to an old age, the institutions available would not provide adequate care. They are also concerned that because of Phillip's pleasant outgoing personality he will be victimized by overreaching people. Phillip's parents have concluded that it would be better not to extend his life by means of this operation.

At the conclusion of the hearing the juvenile court concluded:

"I don't think that very personal decisions and rights to make decisions and rights to raise one's children and rights to have one's values and I guess civil rights and liberties should be unduly infringed upon. And, it seems to me that if parents are doing everything that they can, and therefore, are in fact acting in the child's best interests, then its not for me or anybody else to decide that they can't do it.

"I think there is no way to sustain the petition unless we decide that they don't have that right, somebody else has the right to second guess them.

• • •

"And so, with that state of mind, it comes down to a burden of proof. And the court rules that there is no clear and convincing evidence to sustain this petition...."

REASONS FOR GRANTING THE WRIT

I. The Erroneous Application of Too High a Standard of Proof Denied Phillip the Equal Protection of the Law.

The juvenile court held that there was no "clear and convincing evidence" to support state intervention in the parental decision that Phillip should not have corrective heart surgery. On appeal it was argued that the proper standard of proof was the "preponderance of the evidence." The Court of Appeal for the State of California held that the juvenile court had applied the correct standard and affirmed its order dismissing the petition. Petitioner recognizes that the several states are free to adopt varying standards of proof in juvenile dependency proceedings. *Addington v. Texas,* .... U.S. ....; 99 S.Ct. 1804, 1812 (1979); however, the California Court of Appeal erroneously applied a higher standard of proof to the showing made on Phillip's behalf than California law requires. If this were merely a case correcting a California court's erroneous interpretation of our State's laws, this Court would not have jurisdiction. *In re Murchison,* 349 U.S. 133, 135 (1955). But, the California Court of Appeal's erroneous interpretation will deprive Phillip of his right to life which is protected by the Fourteenth Amendment of the United States Constitution. We therefore ask this Court to grant a writ of certiorari to review the opinion of the California Court of Appeal on the ground that its erroneous application of our state's standard of proof in juvenile dependency cases has denied Phillip the equal protection of the law. See *In re Murchison, supra* at 136; Compare *Barr v. Columbia,* 378 U.S. 146, 149 (1964); *NAACP v. Alabama,* 357 U.S. 449, 457-458 (1958); 28 USC section 1257(3).

Both before[3] and after[4] the decision of the California Court of Appeal in Phillip's case, California courts have consistently held that the standard of proof to be applied to a petition brought pursuant to California Welfare and Institutions Code section 300 is the "preponderance of the evidence,"[5] where that petition does not seek to terminate the parent-child relationship in favor of a third party.

In deciding that the juvenile court had applied the correct standard of proof to the showing made on Phillip's behalf, the California Court of Appeal relied on *In re Robert P.* (1976) 61 Cal.App.3d 310; 132 Cal.Rptr. 5. Janice P., Robert's mother, appealed from an order of the juvenile court "depriving her of the custody of her minor son." See *In re Robert P., supra,* 61 Cal.App.3d at 313; 132 Cal.Rptr. at 6. As noted in *Alsager v. District Court of Polk City, Iowa,* (S.D. Iowa, C.D. 1975) 406 F.Supp. 10, 25, the Fourteenth Amendment of the United States Constitution requires a standard of proof greater than mere preponderance of the evidence to terminate parental custody. The California Supreme Court, consistent with *Alsager,* has held that before a juvenile court may award custody to a nonparent a clear showing that such award is essential to avert harm to the child is required. A finding that such an award will promote the "best interest" or the "welfare" of the child will not suffice. *In re B. G.* (1974) 11 Cal.3d 679, 698-699; 114 Cal. Rptr. 444, 457-459.

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3. *In re Lisa D.* (1978) 81 Cal.App.3d 192; 146 Cal.Rptr. 178; *In re Christopher B.* (1978) 82 Cal.App.3d 608; 147 Cal.Rptr. 390.

4. *In re Nicole B.* (1979) 93 Cal.App.3d 874; 155 Cal.Rptr. 916.

5. California Welfare and Institutions Code section 355 provides in pertinent part: "At the hearing, the court shall first consider only the question whether the minor is a person described by section 300, and for this purpose, any matter of information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, *proof by a preponderance of evidence,* legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by section 300." (Emphasis added).

The petition filed on Phillip's behalf did not seek to terminate his parents' custody.[6] All that the petition sought was an adjudication that Phillip was a dependent child of the juvenile court on the grounds that his parents' refusal to consent to corrective heart surgery deprived him of a "necessity of life." The contemplated disposition was an order from the juvenile court allowing the operation to be performed. There was no request that the juvenile court remove Phillip from the custody of his parents and award that custody to a third party. Where the parent-child relationship is neither temporarily nor permanently altered, the appropriate standard of proof in California has always been the preponderance of the evidence test.

> "Here, the trial court was simply talking about the standard of proof necessary to support the factual allegations of dependency under section 300 of the Welfare and Institutions Code which, under section 355 of the same code is 'proof by a preponderance of evidence, legally admissible in a trial of civil cases . . . .'
>
> • • •
>
> "Questions concerning a more astringent standard do not arise until a finding of dependency results in a disposition which severs the parent-child relationship either temporarily or permanently." *In re Lisa D.,* 81 Cal.App.3d at 196; 146 Cal.Rptr. at 180.
>
> "However, the dependency hearing may not always end in removing the child from the parents' custody, as shown by the case at hand. The court may simply retain jurisdiction to supervise the proper maintenance of the child's environment.
>
> "We are of the opinion that clear and convincing proof is required only when the final result is to sever the parent-child relationship and award custody to a nonparent.
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> • • •

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6. Since birth Phillip has rarely been in the physical custody—i.e., residing with—his parents.

"The facts of *In re Robert P.* are substantially the same as here, but implicit in that case is the fact that custody of the minor was removed from the parent to a foster home. (*Id.* at page 313, 315). With such an implication, Civil Code section 4600 would require the higher standard.

"We do not believe we are mandated by the constitutional rights of either parent or child to expand the existing statutory standard of proof, where the only action of the court is to declare the minor to be a dependent child, and to retain custody of the child in the parents.

"We therefore hold the proper standard of proof in Welfare and Institutions Code section 300 cases, where the child is not removed from parental custody, to be a preponderance of the evidence, as per section 355 of that code." *In re Christopher B., supra,* 82 Cal.App.3d at 617-618; 147 Cal.Rptr. at 395-396.

"In response to the mother's assertion concerning the proper standard of proof to be applied, we need only point out it is now well established in cases of this sort, where the parent is not deprived of custody in favor of a nonparent, the correct standard for both jurisdictional and dispositional purposes is proof by a preponderance of the evidence . . . ." *In re Nicole B., supra,* 93 Cal.App.3d at 882; 155 Cal.Rptr. at 920-921.

Wherefore, petitioners respectfully submit that the California Court of Appeal has erroneously applied the higher standard of proof required when the parent-child relationship is severed and thereby denied Phillip the equal protection of our laws.

This Court has had occasion to recently discuss the obverse standard of proof in *Addington v. Texas,* .... U.S. ....; 99 S.Ct. 1804 (1979). As the court noted therein, in cases involving individual rights the standard of proof reflects the value society places on individual liberty. *Addington v. Texas, supra,* 99 S.Ct. at 809. Petitioner submits that

there is no societal interest served by requiring a minor diagnosed as needing corrective heart surgery to bear a disproportionate share of the risk of error in proceedings to obtain medical care over his parents' objections. Compare *Addington v. Texas, supra,* 99 S.Ct. at 1808. The use of the higher standard of proof is particularly intolerable where the parents' objections are based not on their concern for the risks of the medical treatment, but on their opinion as to the quality of the life to be lived. The injury to Phillip from an erroneous determination by the juvenile court is an early death. All he asks is to share the risk of error in that determination equally with society. Compare *Addington v. Texas, supra,* 99 S.Ct. at 1810.

II. The Admission of "Quality of Life" Evidence in the Juvenile Court Proceedings Denied Phillip Due Process of Law.

Phillip's parents' refusal to consent to corrective surgery was based on their belief that it was not in Phillip's best interest to prolong his life when there was no hope of improving its quality. The juvenile court, impressed by the depth and sincerity of Phillip's parents' beliefs, adopted them when it opined that it was inappropriate for a court to second guess the parents. Consideration of quality of life are beyond the scope of matters which may properly be adjudicated in a court of law in this country. To decide whether Phillip is to have life-saving surgery based on the "quality" of his life or his degree of mental retardation creates a suspect classification under the Fourteenth Amendment. Compare *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1; *Burgdorf;* "A History of Unequal Treatment; Qualification of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause" 15 Santa Clara Lawyer 855.

> "The right to life, liberty and the pursuit of happiness is not reserved to the healthy, able-bodied children and adults. It applies with even more force and intensity to the helpless, the physically handicapped, the mentally defective and the most unfortunate of children such as those at Willowbrook." *In re D.* (1972) 70 Misc. 2d 953; 355 N.Y.S.2d 638, 651.

The juvenile court should not have considered the "quality" of Phillip's life in deciding whether consent for the surgery should be ordered. See *Horan;* "Euthanasia—Medical Treatment and the Mongoloid Child; Death as a Treatment of Choice?" 27 Baylor L.Rev. 76.

The Court of Appeal of the State of California found substantial evidence to support the decision of the juvenile court in the testimony that the risk of this operation is increased because Phillip suffers from Down's Syndrome. Since the parents' opposition rested primarily upon quality of life considerations, this is akin to affirming a criminal conviction where a coerced confession has been admitted because there is other evidence of guilt in the record. Both procedures are fundamentally unfair and violative of the due process clause of the Fourteenth Amendment. Compare *Jackson v. Denno* (1964) 378 U.S. 368; *Blackburn v. Alabama* (1960) 361 U.S. 199; and *Payne v. Arkansas* (1958) 356 U.S. 560.

The mentally retarded in California are entitled to detailed procedural safeguards before they may be deprived of their right to reproduce. *Guardianship of Tulley* (1978) 83 Cal.App.3d 698, 705, 146 Cal.Rptr. 266, 270-271. Petitioner respectfully submits that Phillip's life cannot be forfeit in a proceeding affording less protection. Due process requires that this matter be remanded to the juvenile court with directions that a new hearing be held where only evidence of the risks posed by the operation and its expected benefits is admitted.

CONCLUSION

Petitioner submits that since Phillip's life depended upon the outcome of the proceedings in the Juvenile Court, the burden of proof could not be weighed against him.

The Juvenile Court considered quality of life evidence in determining if life-saving medical treatment should be authorized for Phillip. Petitioner submits that, while physicians who must determine which cases should be treated and parents called upon to decide whether to consent to such treatment may consider such a concept, such evidence cannot be considered in a court of law functioning under our Constitution. The reception of such evidence in the Juvenile Court taints the proceedings in this case with unfairness; particularly here, where the parents' objections are based solely on quality of life considerations, and the Juvenile Court concluded it did not have the "right to second guess them."

Wherefore, Petitioner, on behalf of Phillip B., respectfully requests that this Court issue a writ of certiorari to review the decision of the California Court of Appeal, First Appellate District, Division Four in "*In re Phillip B.*", number 1/Civ. 44291 in the files of that Court.

DATED: October 16, 1979

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Appendix A

CERTIFIED FOR PUBLICATION

In The Court of Appeal of the State of California

FIRST APPELLATE DISTRICT, DIVISION FOUR

Filed 11-8-1976 Court of Appeal—First App. Dist. Clifford C. Porter, Clerk.

1 Civil No. 44291
(Sup. Ct. No. 66103)

IN RE PHILLIP B., a Person Coming Under the Juvenile Court Law
RICHARD W. BOTHMAN, etc., and

PHILLIP B.,
Plaintiffs and Appellants,

vs.

WARREN B., et al.,
Defendants and Respondents.

A petition was filed by the juvenile probation department in the juvenile court, alleging that Phillip B., a minor, came within the provision of Welfare and Institutions Code section 300, subdivision (b),[1] because he was not provided with the "necessities of life."

The petition requested that Phillip be declared a dependent child of the court for the special purpose of ensuring that he receive cardiac surgery for a congenital heart defect. Phillip's parents had refused to consent to the surgery. The juvenile court dismissed the petition. The appeal is from the order.

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1. All statutory references are to the Welfare and Institutions Code, unless otherwise stated.

Phillip is a 12-year-old boy suffering from Down's Syndrome.[2] Since birth, he has been institutionalized. Phillip suffers from a congenital heart defect—a ventricular septal defect[3] that results in elevated pulmonary blood pressure. Due to the defect, Phillip's heart must work three times harder than normal to supply blood to his body. When he overexerts, unoxygenated blood travels the wrong way through the septal hole reaching his circulation, rather than the lungs.

If the congenital heart defect is not corrected, damage to the lungs will increase to the point where his lungs will be unable to carry and oxygenate any blood. As a result, death follows. During the deterioration of the lungs, Phillip will suffer from a progressive loss of energy and vitality until he is forced to lead a bed-to-chair existence.

Phillip's heart condition has been known since 1973. At that time Dr. Gathman, a pediatric cardiologist, examined Phillip and recommended cardiac catheterization to further define the anatomy and dynamics of Phillip's condition. Phillip's parents refused.

In 1977, Dr. Gathman again recommended catheterization and this time Phillip's parents consented. The catheterization revealed the extensive nature of Phillip's septal defect, thus it was Dr. Gathman's recommendation that surgery be performed.

Dr. Gathman referred Phillip to a second pediatric cardiologist, Dr. William French of Stanford Medical Center.

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2. "Down's syndrome or mongolism is a chromosomal disorder producing mental retardation caused by the presence of 47 rather than 46 chromosomes in a patient's cells, and marked by a distinctively shaped head, neck, trunk, and abdomen." (Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 Stan.L.Rev. 213, fn. 5.)

3. In other words, a hole between his right and left ventricles.

Dr. French estimates the surgical mortality rate to be five to ten percent, and notes that Down's Syndrome children face a higher than average risk of postoperative complications. Dr. French found that Phillip's pulmonary vessels have already undergone some change from high pulmonary artery pressure. Without the operation, Phillip will begin to function less physically until he will be severely incapacitated. Dr. French agrees with Dr. Gathman that Phillip will enjoy a significant expansion of his life span if his defect is surgically corrected. Without the surgery, Phillip may live at the outset 20 more years. Dr. French's opinion on the advisability of surgery was not asked.

I

It is fundamental that parental autonomy is institutionally protected. The United States Supreme Court has articulated the concept of personal liberty found in the Fourteenth Amendment as a right of privacy which extends to certain aspects of a family relationship. (United States v. Orito (1973) 413 U.S. 139, 142 [right of privacy includes right of marriage, procreation, motherhood, child rearing, and education]; Roe v. Wade (1973) 410 U.S. 113, 152-153 [right of privacy extends to child rearing and education]; Wisconsin v. Yoder (1972) 406 U.S. 205, 232 [parental right to determine child's religious upbringing]; Eisenstadt v. Baird (1972) 405 U.S. 438, 453 [right to obtain contraceptives]; Griswold v. Connecticut (1965) 381 U.S. 479, 485-486 [right to marital privacy]; Skinner v. Oklahoma (1942) 316 U.S. 535, 541 [right to marriage and procreation]; Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535 [liberty of parents to direct education of their children]; Meyer v. Nebraska (1923) 262 U.S. 390, 399 [liberty of parents to raise child].) "It is cardinal with us that the

custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (Prince v. Massachusetts (1944) 321 U.S. 158, 166.)

Inherent in the preference for parental autonomy is a commitment to diverse lifestyles, including the right of parents to raise their children as they think best. Legal judgments regarding the value of childrearing patterns should be kept to a minimum so long as the child is afforded the best available opportunity to fulfill his potential in society.

Parental autonomy, however, is not absolute. The state is the guardian of society's basic values. Under the doctrine of *parens patriae,* the state has a right, indeed, a duty to protect children. (See e.g., Prince v. Massachusetts, *supra,* 321 U.S. 158 at p. 166.) State officials may interfere in family matters to safeguard the child's health, educational development and emotional well-being.

One of the most basic values protected by the state is the sanctity of human life. (U.S. Const., 14th Amend., § 1.) Where parents fail to provide their children with adequate medical care, the state is justified to intervene. However, since the state should usually defer to the wishes of the parents, it has a serious burden of justification before abridging parental autonomy by substituting its judgment for that of the parents.

Several relevant factors must be taken into consideration before a state insists upon medical treatment rejected by the parents. The state should examine the seriousness of the harm the child is suffering or the substantial likelihood that he will suffer serious harm; the evaluation for the treatment by the medical profession; the risks involved in medically treating the child; and the expressed preferences

of the child. Of course, the underlying consideration is the child's welfare and whether his best interests will be served by the medical treatment.

Section 300, subdivision (b), permits a court to adjudge a child under the age of 18 years a dependent of the court if the child is not provided with the "necessities of life."

The trial judge dismissed the petition on the ground that there was "no clear and convincing evidence to sustain this petition."

The rule is clear that the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will suppport the conclusion reached by the trier of fact. (See 6 Witkin, California Procedure (2d ed. 1971) Appeal, § 245, p. 4236.) The "clear and convincing evidence" standard of proof applies only to the trial court, and is not the standard for appellate review. (See Crail v. Blakely (1973) 8 Cal.3d 744, 750.)

Turning to the facts of this case, one expert witness testified that Phillip's case was more risky than the average for two reasons. One, he has pulmonary vascular changes and statistically this would make the operation more risky in that he would be subject to more complications than if he did not have these changes. Two, children with Down's Syndrome have more problems in the postoperative period. This witness put the mortality rate at five to ten percent, and the morbidity would be somewhat higher. When asked if he knew of a case in which this type of operation had been performed on a Down's Syndrome child, the witness replied that he did, but could not remember a case involving a child who had the degree of pulmonary vascular change that Phillip had. Another expert witness testified that one of the risks of surgery to correct a ventricular septal defect was

damage to the nerve that controls the heart beat as the nerve is in the same area as the defect. When this occurs a pacemaker would be required.

The trial judge, in announcing his decision, cited the inconclusiveness of the evidence to support the petition.

On reading the record we can see the trial court's attempt to balance the possible benefits to be gained from the operation against the risks involved. The court had before it a child suffering not only from a ventricular septal defect but also from Down's Syndrome, with its higher than average morbidity, and the presence of pulmonary vascular changes. In light of these facts, we cannot say as a matter of law that there was no substintial evidence to support the decision of the trial court.

II

In denying the petition the trial court ruled that there was no clear and convincing evidence to sustain the petition. The state contends the proper standard of proof is by a preponderance of the evidence and not by the clear and convincing test. The state asserts that only when a permanent severance of the parent-child relationship is ordered by the court must the clear and convincing standard of proof be applied. Since the petition did not seek permanent severance but only authorization for corrective heart surgery, the state contends the lower standard of proof should have been applied.

In the case of *In re Robert P.* (1976) 61 Cal.App.3d 310, 318, the court pointed out that a dependency hearing pursuant to section 600,[4] need not result in a permanent severance of the parent-child relationship. Section 366 (formerly § 729) requires subsequent hearings at periods not exceeding one year until such time as the court's jurisdiction over such minor is terminated. *In re Robert P.* held that even though the severance need not be permanent the standard of proof was "clear and convincing" and not a "preponderance of the evidence." The statement in *In re Christopher B.* (1978) 82 Cal.App.3d 608, cited by appellant, that clear and convincing proof is required only when the final result is to sever the parent-child relationship and award custody to a nonparent is dicta. The *Christopher* court did not remove the child from the parents' custody but simply retained jurisdiction to supervise proper maintenance of the child's environment. The "clear and convincing standard" was proper in this case.

4. Section 600 has been repealed and the subject matter is now included in section 300.

III

Section 353 requires that at the beginning of the hearing on a petition, "[t]he judge shall ascertain whether the minor and his parent or guardian or adult relative, as the case may be, has been informed of the right of the minor to be represented by counsel, and if not, the judge shall advise the minor and such person, if present, of the right to have counsel present and where applicable, of the right to appointed counsel."

Amicus Curiae contends the judge erred in failing to notify Phillip of his right to counsel, thus Phillip was not properly represented.

A minor has a statutory right to counsel. (§ 318.5.) If a minor is already represented by counsel, it is not crucial that a judge inform a minor of his right to counsel. "[I]f either the minor or his parents . . . appear without counsel, the judge shall advise the *unrepresented* party of his rights under this section." (§ 318.5, subd. (d); emphasis added.)

In the present case, the facts show that a deputy district attorney was representing Phillip at the hearing. He was

introduced to the judge as Phillip's attorney. The deputy district attorney proceeded to make an opening statement and continued to represent Phillip throughout the entire hearing.

The judge was under no statutory duty to inform Phillip of his right to counsel when it was evident to the court that Phillip was, in fact, represented by counsel.

The order dismissing the petition is affirmed.

CERTIFIED FOR PUBLICATION

.....

Caldecott, P. J.

We concur:

.....

Rattigan, J.

.....

Christian, J.

In re Phillip B.—1 Civil No. 44291

Trial Court:	Superior Court Santa Clara County
Trial Judge:	Hon. Eugene M. Premo
Attorneys for Plaintiffs/Appellants:	Evelle J. Younger Attorney General of the State of California Jack R. Winkler, Chief Assistant Attorney General Criminal Division Edward P. O'Brien, Assistant Attorney General Timothy A. Reardon, Deputy William D. Stein, Deputy 6000 State Building San Francisco, Ca. 94102
Attorneys for Defendants/Respondents:	LEONARD P. EDWARDS Attorney at Law 28 North First Street San Jose, Ca. 95113
Amicus Curiae on behalf of Plaintiffs/Appellants:	Robert A. Baines, Directing Attorney Santa Clara County Bar Assn. Law Foundation, Inc. P.O. Box 267 San Jose, Ca. 95103
Amicus Curiae on behalf of Defendants/Respondents:	S. L. Stagnitto, Attorney at Law 2000 West Hedding Street San Jose, Ca. 95128

Appendix B

[Civ. No. 44291, First Dist., Div. Four. June 7, 1979.]

In re PHILLIP B., a Person Coming Under the Juvenile Court Law. RICHARD W. BOTHMAN, as Chief Probation Officer, etc., et al., Plaintiffs and Appellants, v. Warren B. et al., Defendants and Respondents.

[Modification* of opinion (92 Cal.App.3d 796: — Cal.Reptr. —) on denial of petition for rehearing.]

THE COURT.—The opinion is modified on page 2, line 5 [92 Cal.App.3d 796, 800, advance report, lines 1 and 2] as follows: Strike the sentence "Since birth, he has been institutionalized" and insert the sentence "At birth his parents decided he should live in a residential care facility."

The petition for rehearing is denied.

---

*This modification requires editorial changes in the first paragraph of the summary, page 796, and headnote (5a, 5b), page 798 of the advance report. In the bound volume report, the second sentence of the first paragraph of the summary will be changed to read "The boy, also suffering from Down's syndrome, had been in a residential care facility since birth." Headnote (5a, 5b), page 798, lines 10-11 will be changed to read "would have greater than average risk because the child suffered from Down's syndrome, which has ??".

[June 1979]

Appendix C

CLERK'S OFFICE, SUPREME COURT
4250 State Building

SAN FRANCISCO, CALIFORNIA 94102

JUL 19 1979

I have this day filed Order "Hearing denied"

In re: 1 Civ. *No.* 44291
In re Philip B., A Minor
Bothman, etc., et al.

vs.

Warren B., et al.

Respectfully,

G. E. BISHEL
Clerk

Appendix D

WELFARE AND INSTITUTIONS CODE

§ 300 Persons subject to jurisdiction

Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:

(a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control. No parent shall be found to be incapable of exercising proper and effective parental care or control solely because of a physical disability, including, but not limited to, a defect in the visual or auditory functions of his or her body, unless the court finds that the disability prevents the parent from exercising such care or control.

(b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.

(c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality.

(d) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is.

79-698

IN THE

Supreme Court of the United States

OCTOBER TERM

No. A-293

RICHARD W. BOTHMAN, as Chief Probation Officer, Santa Clara County Superior Court, Juvenile Division; ex rel, PHILLIP B., a minor,

Petitioner,

VS.

WARREN B. and PATRICIA B.,

Respondents.

Response to Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

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Petitioner,

vs.

WARREN B. and PATRICIA B.,

Respondents.

Response to Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

Respondents pray that this Court deny the petition for Writ of Certiorari to review the decision of the Court of Appeal of the State of California, First Appellate District, Division Four, entered in the case of *"In re Phillip B.,* a person coming under the Juvenile Court Law," entered on May 8, 1979.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, is reported at 92 Cal.App.3d 796; 156 Cal.Rptr. 48. The modification of the opinion upon denial of a petition for rehearing is reported at 93 Cal.App.3d 1010(1). The notification by the

Clerk of the California Supreme Court that a petition for hearing was denied is not reported. The opinion, modification and denial are each attached to the Petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

STATEMENT OF ARGUMENT

I. THIS COURT SHOULD NOT REVIEW A STATE APPELLATE COURT DECISION ON THE PROPER STANDARD OF PROOF APPLICABLE IN A JUVENILE COURT HEARING WHEN THE STATE COURT SPECIFICALLY CONSIDERED AND REJECTED THE PETITIONER'S CONTENTION THAT THE INCORRECT STANDARD WAS APPLIED AND WHEN THE APPELLATE DECISION IS CONSISTENT WITH CURRENT STATE LAW.

II. THIS COURT SHOULD NOT CONSIDER THE EFFECT OF INTRODUCTION OF SO-CALLED "QUALITY OF LIFE" EVIDENCE AT THE JUVENILE COURT HEARING IN THIS CASE WHEN THE JUVENILE COURT CLEARLY BASED ITS DECISION UPON DIFFERENT GROUNDS, WHEN THAT EVIDENCE WAS NOT OBJECTED TO AT TRIAL, AND WAS NOT RAISED BY PETITIONER IN THE CALIFORNIA APPELLATE PROCEEDINGS.

STATUTE INVOLVED

This response concerns proceedings under California Welfare and Institutions Code Section 300(b) which is set forth in Appendix A.

INTRODUCTION

The central issue in this case is whether the State should intervene and override a family's medical decision relating to a non-emergency, somewhat risky, life-endangering operation for their retarded son. The Juvenile Court Judge found that there was insufficient evidence offered by the State to justify intervention and dismissed the petition.

STATEMENT OF FACTS AND PROCEEDINGS

Phillip Becker is a mentally retarded eleven year old boy suffering from Down's syndrome, also known as Mongolism (Reporter's Transcript at 6.) Phillip, like approximately 40 percent of the people with Down's syndrome, also suffers from a congenital heart defect—in his case, a ventricular septal defect that results in elevated pulmonary blood pressure (RT at 24.)

Mr. and Mrs. Warren Becker, Phillip's parents, learned of their son's Down's condition immediately after his birth (RT at 87.) After consulting with the physician who delivered Phillip as well as a representative of the county health department, the Beckers placed Phillip in a special home for retarded children (RT at 88, 104.) During Phillip's early years, the Beckers paid the full cost of Phillip's care (RT at 88.) When state funds became available, the Beckers began to share the cost of Phillip's care with the state and currently make regular monthly contributions (RT at 88-89.) When the operator of Phillip's first home retired, the Beckers placed their child in the care of another operator. After a relatively short period they determined he was not receiving adequate care and removed him to still another facility (RT at 89.) Since 1972 Phillip has resided at a nursery (now called Schnur's Nursery) for

retarded children in San Jose (RT at 75.) Phillip attends a special school for retarded children at the Rouleau Children's Center (RT at 62.)

Although they have reduced their visits with Phillip as they gained confidence in the care he was receiving at Schnur's Nursery (RT at 89), the parents still visit Phillip five or six times per year, and call frequently to check on his condition (RT at 110.) They keep up to date with school and medical reports and have been in attendance at his hospitalizations for dental surgery (RT at 90.)

In 1973, Dr. Gary Gathman, a pediatric cardiologist at the Valley Medical Center, diagnosed Phillip's heart defect and recommended a cardiac catheterization to determine the extent of the defect. The parents decided against catheterization (RT at 11.) At times since 1973 Phillip has received medication for his cardiac difficulties (RT at 11-12), however from 1973 to 1977 his health was good except for one attack of pneumonia which responded to treatment from antibiotics (RT at 12.)

In 1977 Dr. Gathman again saw Phillip, when he needed extensive dental work requiring general anesthesia. The anesthesiologist requested Dr. Gathman's opinion as to whether anesthesia was feasible for a patient with Phillip's heart defect (RT at 12-13.) Dr. Gathman again recommended catheterization to ensure that Phillip could receive anesthesia (RT at 13), and the Beckers consented (RT at 90.) On the basis of the catheterization, Dr. Gathman recommended to the Beckers that Phillip receive surgery to repair the lesion in his heart (RT at 21.) At the hearing he testified that although the mortality risk in this type of operation for a normal child is 1 percent, the risk for a Down's child is 3-5 percent (RT at 22.) He added that surgery poses the additional risk of damage to the nerve that controls heart pumping, damage which would require the insertion of a pacemaker to restore normal beating (RT at 30-31.) Dr. Gathman also stated that he does not recommend this type of surgery for retarded children suffering from intellectual incapacity so severe as to deny them the prospect of a reasonable quality of life (RT at 34-35), but felt that Phillip's mental capacity and future prospects warranted the operation (RT at 34.) He testified he did not know how long Phillip would live without the operation but predicted that Phillip's life span was likely to be an additional 20 years (RT at 16), and that as Phillip grew older he would experience pain and loss of energy (RT at 18.) Though the relatively short experience of modern medicine with cardiac surgery makes any predictions uncertain (RT at 29), Dr. Gathman speculated that with the operation Phillip's life might be prolonged (RT at 28.) The extent of a normal life span for a Down's child, however, is not known (RT at 29.)

A second pediatric cardiologist, Dr. William French of Stanford Medical Center, estimated the surgical mortality risk at 5-10 percent for the operation (RT at 42), and noted that Down's children face a higher than average risk of morbidity—post-operative complications. Noting the difficulty of precise predictions in this area, Dr. French stated that he thought the operation would increase Phillip's life span (RT at 43), and when consulted by Dr. Gathman, told him he considered the operation possible and the surgical risk reasonable. Nevertheless, Dr. French did not directly recommend to the parents that they consent to the surgery (RT at 44.) He stated that before he makes a recommendation, he normally engages in extended discussions

with the family and invokes the aid of other medical professionals and a social worker, because he believes such a decision involves a careful subjective weighing of personal and family as well as strictly medical factors (RT at 45-46, 55-56.) He noted that in at least one instance where he did recommend surgery to the parents of a Down's child with a congenital heart defect, the parents chose against surgery and Dr. French respected their decision (RT at 47.) He testified that all he ever offered parents was a recommendation since the parents ultimately make the decision.

A third physician, Dr. Henry Hartzell, a pediatrician at the Palo Alto Medical Clinic, submitted a letter in which he concurred in the Beckers' decision not to have the surgery performed, emphasizing the personal factors to be weighed in the decision along with the medical facts (Clerk's Transcript at 23-26.)

Seeking moral guidance and being Catholics, the Beckers consulted with a priest following their conference with Dr. Gathman (RT at 94) and, shortly before the hearing, with another priest, a Jesuit college Professor of Theology, whom they had known earlier during their residence in Kansas City (RT at 98-99.) The latter priest, after three discussions with the Beckers totaling ten hours, concurred in their decision not to have the surgery for Phillip. In a still further attempt to obtain guidance for their decision, Mrs. Becker attended an all-day seminar on Down's children and their medical problems at Stanford University (RT at 123.) The seminar was presented by doctors, nurses, and social workers (RT at 123.) Taking into account the available medical opinions (RT at 48, 96-97, 123), the consultations with family members (RT at 91, 112-113, 122-123), advice

from other parents of Down's children (RT at 91), religious counsel (RT at 98-99), their fears of Phillip's death from the operation (RT 109), and what they perceived would be Phillip's future (if he survived the operation) in the various institutions and facilities to which he would be moved as he grows older (RT 94, 104-107), the Beckers decided not to consent to the operation. They believed this decision would be in their son's best interests (RT at 94.)

Their chief concerns were 1) the risks inherent in the operation; 2) the lack of medical expert unanimity on the necessity of the operation; and 3) the danger that if Phillip's life expectancy is artificially extended, he would likely outlive them and therefore be without the guaranteed financial support or the supervision of his environment that only they can provide. In particular, the Beckers fear that if his life is extended by drastic medical means, Phillip will eventually be warehoused in the type of institution in which most older retarded people are forced to live (RT at 94-98, 122-24.)

In January of 1978, while the Beckers were making their decision, they learned from a supervisor at the County Mental Health Department that the state was planning to file a petition in juvenile court under § 300(b) of the Welfare and Institutions Code to declare Phillip a dependent child of the court (RT at 95.) The petition was filed on February 17, 1978, on the grounds that the Beckers' decision not to consent to the surgery constituted for Phillip a denial of the "necessities of life" and that Phillip should be declared a dependent child of the court for the special purpose of ensuring that he receive the cardiac surgery.

Hearing on the petition was held on April 27, 1978, and April 28, 1978, before the Honorable Eugene Premo. The court dismissed the petition to declare Phillip a dependent

child of the court because the state had failed to prove its case. Judge Premo stressed that the arguments and opinions marshalled in favor of surgery for Phillip involved subjective weighing of medical, social, and moral factors, and that the state could not override the judgment of the parents in weighing such factors themselves and acting in what they reasonably considered their child's best interests (RT at 153.)

The court did not rely upon the letter written by Dr. Hartzell and submitted by the Beckers. The court commented that since the writer of the letter did not testify, the court could not evaluate the contents of the letter (RT at 148.)

The court found that the proposed operation was not a life or death situation and classified it as an elective surgery (RT at 147.) The court was unimpressed with the medical testimony presented by the State and noted the fallibility of the medical profession in similar cases (RT at 148.) It found that the parents were neither negligent nor recalcitrant (RT at 149.) Instead the judge found that the Beckers had demonstrated intelligence, care and love and had devoted a great deal of thought on the subject matter (RT at 149.) The Judge concluded that the Beckers had fulfilled all of their legal and moral responsibilities as parents and that their decision was both carefully considered and properly arrived at (RT at 150-152.) Given the facts of the case, the court found that no one was in a better position to make the final decision whether to operate than the Beckers and that they had fulfilled their parental responsibilities completely (RT at 152.) The court concluded that no clear and convincing evidence was presented to sustain the petition (RT at 153.)

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT REVIEW A STATE APPELLATE COURT DECISION ON THE PROPER STANDARD OF PROOF APPLICABLE IN A JUVENILE COURT HEARING WHEN THE STATE COURT SPECIFICALLY CONSIDERED AND REJECTED THE PETITIONER'S CONTENTION THAT THE INCORRECT STANDARD WAS APPLIED AND WHEN THE APPELLATE DECISION IS CONSISTENT WITH CURRENT STATE LAW.

The Juvenile Court ruled that there was no "clear and convincing" evidence to sustain the petition urging state intervention to override the Beckers' decision not to have heart surgery for their son. The Court of Appeal for the State of California held that "clear and convincing" was the correct standard of proof and affirmed the Juvenile Court's order.

A brief review of the established principles of law in this area is in order. The settled state of both federal and California law is in accord with common sense, tradition, and biological instinct—that parental rights are not subject to state interference absent substantial cause. The privacy of family life, free from state intervention, is also a fundamental liberty protected by the Fourteenth Amendment. *Parham v. J. R.* (1979) ..... U.S. .....; 99 S.Ct. 2493; *United States v. Orito* (1973) 413 U.S. 139, 142; *Wisconsin v. Yoder* (1972) 406 U.S. 230, 235; *Stanley v. Illinois* (1972) 405 U.S. 645, 651; *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-35; *Meyer v. Nebraska* (1923) 262 U.S. 390, 400-03.

Similarly, California courts recognize that a "dominant parental right" to control the lives of their children "pervades our law," and have given content to the dependency statute at issue here only by limiting its application to

"extreme cases of neglect, cruelty, or continuing exposure to immorality." See *In Re Raya* (1967) 255 Cal.App.2d 260 at 265, 63 Cal.Rptr. 252 (citing cases). The presumption is in favor of parental authority free from state interference. *County of Alameda v. Espinoza* (1966) 243 Cal.App.2d 534, 52 Cal.Rptr. 527. These presumptions of parental authority limit state intervention into parental decision-making only to those situations where there is a compelling state interest and proof of a substantial threshold of harm to the child likely to result from parental actions. See *Alsager v. District Court of Polk County,* 406 F.2d 10 (D. Iowa 1975).

In light of the foregoing the specific question raised herein can be addressed. The several states are free to adopt varying standards of proof in juvenile dependency proceedings subject only to these constitutional limitations. (*Addington v. Texas,* 441 U.S. 418; 99 S.Ct. 1804, 1812 (1979); moreover, the Supreme Court has no jurisdiction to correct a state court's interpretation of its own laws even if erroneous. *In re Murchison* (1955) 349 U.S. 133, 135. Petitioner concedes these points of law. In the instant case the juvenile court applied the proper standard of proof and the Court of Appeal, after carefully considering the question on appeal, decided it correctly under California law.

California courts have ruled that at least two different standards of proof are applicable to dependency proceedings depending on the type of case before the court. The applicable standard of proof depends upon the severity of the likely disposition that will follow a jurisdictional finding. In cases involving the temporary or permanent removal of a child from a parent, the "clear and convincing" standard of proof is required before the petition can be sustained and the intervention of the state permitted. *In re Robert P.* (1976) 61 Cal.App.3d 310, 318, 132 Cal.Rptr. 5, 10; *In re*

Terry D. (1978) 83 Cal.App.3d 890, 898; 148 Cal.Rptr. 221; See also *In re B.G.* (1974) 11 Cal.3d 679, 114 Cal.Rptr. 444, 523 P.2d 244. However, in cases involving a finding of dependency under Welfare and Institutions Code Section 300, but with no removal of a child from his parents' custody or termination of parental rights, the petitioner (the state) may prevail on "preponderance of evidence" test. *In re Lisa D.* (1978) 81 Cal.App.3d 192; 146 Cal.Rptr. 178; *In re Christopher B.* (1978) 82 Cal.App.3d 608; 147 Cal.Rptr. 390; *In re Nicole B.* (1979) 93 Cal.App.3d 874, 155 Cal. Rptr. 916.

The case of Phillip Becker is not directly on point with any of these cases, since it does not involve a "severance" of parental ties in the ordinary sense. The Juvenile Court Judge correctly looked past the technical jurisdictional question to the disposition—court-ordered life-endangering surgery for Phillip to remedy a non-life or death medical problem—which a finding of jurisdiction inevitably entailed. Such an order is far closer in its severity to the types of disposition for which precedent establishes the "clear and convincing" evidence test than to the mild dispositions in such cases as *Christopher B.,* (*supra*) and *Lisa D.* (*supra*) in which proof by preponderance was held sufficient.

Moreover, orders declaring a minor a dependent child of the juvenile court are subject in California to mandatory review within a calendar year at which time errors can be corrected or second thoughts by the state's officers given effect. California *Welfare and Institutions Code* Section 366 (Appendix B). But the order sought here is literally a "once in a lifetime" matter. The consequences of the surgery will be irremediable and they are ones with which Phillip and his parents will live forever—or his parents alone, should the child die on the operating table. Expressions of regret from the state, if such there be, will come too late. If any-

thing, proof beyond a reasonable doubt should be required, rather than clear and convincing evidence, before state action of such potentially disastrous proportions is permitted.

The Juvenile Court's specific findings as contained in its opinion further strengthen its conclusion. The court properly focused upon the operation itself, the parents' participation in the decision-making process, and the state's interest in intervening to override the parents' decision. Its findings as contained in its opinion included the following:

> First, the operation was not a life or death situation;
>
> Second, it was an elective surgery;
>
> Third, what would happen to Phillip without the operation was not known;
>
> Fifth, there was a 10% chance that Phillip would die during the operation, and a higher than average risk of morbidity;
>
> Sixth, the parents had done everything that society could possibly ask of them in order to arrive at an informed decision regarding the operation and what was best for their son;
>
> Seventh, no one else had spent the time and effort the parents had in reaching a decision about the operation; and
>
> Eighth, no one else had shown greater insight into the complexities of the decision than had the parents.

Put in simple basic terms, the court found that the parents must retain their rights to make decisions about their son unless compelling evidence is produced showing they have forfeited that right. This conclusion is consistent with decisions of the California Appellate courts, United States Supreme Court, and learned commentators.

Distinguished legal scholars have asserted that the state should limit its intervention in family medical matters to cases in which medical care is necessary to prevent the immediate death of the child or where its necessity for the best interests of the child is a matter of inarguable moral consensus.

> The state would overcome the presumption of parental autonomy in health-case matters only if it could establish: (a) that the medical profession is in agreement about what nonexperimental medical treatment is right for the child; (b) that the expected outcome of that treatment is what society agrees to be right for any child, a change for healthy growth toward adulthood or a life worth living; *and* (c) that the expected outcome of denial of that treatment would mean death for the child.
>
> Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 *Yale L.J.* 645, 652 (1977).

The record in the trial court reveals that the Juvenile Court Judge would have been justified in finding *none* of these factors in the present case. The three sources of medical testimony were not in full agreement about the risks of the operation. The operation was not necessary to prevent imminent death; medical witnesses could at best speculate that it might extend Phillip's life span beyond a point 20 years in the future, and noted in fact that it might end his life abruptly on the operating table. Finally, the Judge found that the parents' decision not to consent was based on a complex of subjective factors on which there was no clear moral agreement in our society, and which even the medical witnesses recommending the surgery recognized

were inevitable elements in their own conclusions concerning Phillip's case.

It is this final factor that most clearly refutes the claim of the petitioner that the issue at bar is whether a child can be denied "necessities of life" based on arbitrary parental notions of "quality of life." Professor Goldstein asserts that where a proposed operation is unnecessary to prevent imminent death the state can intervene only if the parents' refusal violates common law notions of "plain duty," for the meaning of which he cites Justice Field:

> The duty omitted must be a plain duty, by which I mean that it must be one that does not admit of any discussion as to its obligatory force; one upon which different minds must agree, or will generally agree. Where doubt exists as to what conduct should be pursued in a particular case, and intelligent men differ as to the proper action [the law cannot intervene].
>
> *United States v. Knowles,* 26 F.Cas. 800, 801 (N.D. Cal. 1864) (no. 15, 540). (quoted in Goldstein, *supra,* at 853-54).

Professor Goldstein concludes:

> There can thus be no societal consensus about the "rightness" of always deciding for "life," or of always preferring the predicted result of the recommended treatment over the predicted result of refusing such treatment.
>
> Goldstein, *supra,* at 854.

Parents therefore fulfill their duty in a situation where medical intervention is not necessary to prevent imminent death when they make a reasoned and sincere decision involving subjective factors about which society has no

fixed view. Similarly Professor Michael Wald of Stanford University has noted that in most "medical neglect" cases the party requesting intervention does not represent the "best interests of the child" as objectively defined, but merely another point of view on the issue, and that among competing views of the child's interest the parents' must prevail. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards,* 27 *Stan.L.Rev.* 985 (1975). In the same vein, Goldstein notes: "As *parens patriae* the state is too crude an instrument to become an adequate substitute for the parents . . . . there is no basis for assuming that the judgments of its decision-makers about a particular child's needs would be any better than (or indeed as good as) the judgments of his parents." *Goldstein, supra,* at 650. See also Bennett, *Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis,* 62 Va.L.Rev. 285, 308 (1976) cited in *Parham v. J.R.,* ..... U.S. ....., 99 S.Ct. 2493 at 2505 (1979).

II. THIS COURT SHOULD NOT CONSIDER THE EFFECT OF INTRODUCTION OF SO-CALLED "QUALITY OF LIFE" EVIDENCE AT THE JUVENILE COURT HEARING IN THIS CASE WHEN THE JUVENILE COURT CLEARLY BASED ITS DECISION UPON DIFFERENT GROUNDS, WHEN THAT EVIDENCE WAS NOT OBJECTED TO AT TRIAL, AND WAS NOT RAISED BY PETITIONER IN THE CALIFORNIA APPELLATE PROCEEDINGS.

The Beckers testified at great length about the time and effort they expended trying to decide whether to permit the operation for their son. They consulted a number of friends,

advisors and professionals before making their decision. A great number of reasons for not permitting the operation were considered including the risk of the operation, its necessity, and their son's future, all with an overriding concern—Phillip's best interests.

The Juvenile Court in its decision found that the operation was an elective one, and not a life or death choice. The Court was clearly unimpressed by the force of the medical testimony offered by the state. It pointed to the possible death to the minor in such surgery. Given the choice of whether to operate in such circumstances the Court could not second guess the parents whom it found neither negligent nor recalcitrant.

The Court did not rely upon the evidence concerning so-called "quality of life" considerations. It specifically noted that it could not evaluate the letter from Dr. Hartzell since the Court had no opportunity to question the doctor. Further the Court pointed to the fallibility of the medical profession in similar cases, stressing that a great deal of medical testimony would be necessary to satisfy the court. It was not "quality of life" testimony, but the lack of persuasive evidence presented by the state that doomed the state's case.

Even if this court were to speculate that "quality of life" evidence was considered by the Juvenile Court, it is clear that such consideration would not improperly taint the proceedings. In non-jury trials, which in California includes juvenile court dependency hearings, it is presumed that the trial judge disregarded any inadmissible evidence and relied upon competent evidence. See McCormack, *Evidence,* West, St. Paul (1954), at 137 and citations therein; *People v. Williams* (1965) 239 Cal.App.2d 42, 48 Cal.Rptr. 421; *People v. Garcia* (1965) 239 Cal.App.2d 58, 58 Cal.Rptr.

305. See also *In re Guardianship of Marino* (1973) 30 Cal. App.3d 952, 106 Cal. Rptr. 655.

In any proceeding objection must be made to the admission of improper evidence in order to obtain appellate review, *Shain v. Peterson* (1893) 99 Cal. 486, 33 P. 1085; *Cummings v. Cummings* (1929) 97 Cal.App. 144, 149, 275 P. 245; Witkin, *California Evidence,* § 1285 at p. 1188 (Bancroft-Whitney, 1966); Witkin, *California Procedure* (2d Ed. 1971) p. 4260. Further, for this Court to consider a specific federal question, it must have been raised or drawn in question in the state courts. *Anonymous Nos. 6 & 7 v. Baker,* 360 U.S. 287; *Honeyman v. Honeyman,* 300 U.S. 14. This issue is raised by petitioner for the first time here.

In sum, even if this court decides to consider an issue not raised at trial or in the state appellate courts, the record reveals that the judge did not rely upon any "quality of life" evidence in rendering his decision and instead based his conclusions upon the insufficiency of the state's evidence.

CONCLUSION

For the reasons stated the petition for Writ of Certiorari should be denied.

DATED: February 20, 1980

LEONARD P. EDWARDS
Attorney for Respondent

(Appendices follow)

IN THE

Supreme Court of the United States

OCTOBER TERM

No. A-293

RICHARD W. BOTHMAN, as Chief Probation Officer,
Santa Clara County Superior Court, Juvenile Division;
ex rel, PHILLIP B., a minor,

Petitioner,

vs.

WARREN B. and PATRICIA B.,

Respondents.

Response to Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

Respondents pray that this Court deny the petition for Writ of Certiorari to review the decision of the Court of Appeal of the State of California, First Appellate District, Division Four, entered in the case of "*In re Phillip B.*, a person coming under the Juvenile Court Law," entered on May 8, 1979.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, is reported at 92 Cal.App.3d 796; 156 Cal.Rptr. 48. The modification of the opinion upon denial of a petition for rehearing is reported at 93 Cal.App.3d 1010(1). The notification by the

Appendix B

WELFARE AND INISTITUTIONS CODE

366. Subsequent review. Every hearing in which an order is made adjudging a minor a dependent child of the juvenile court pursuant to Section 300 and every subsequent hearing in which such an order is made, except a hearing at which the court orders the termination of its jurisdiction over such minor, shall be continued to a specific future date not more than one year after the date of such order. The continued hearing shall be placed on the appearance calendar and the probation officer shall make an investigation, file a supplemental report and make his recommendation for disposition. The court shall advise all persons present of the date of the future hearing and of their right to be present, to be represented by counsel and to show cause, if they have cause, why the jurisdiction of the court over the minor should be terminated. Notice of hearing shall be mailed by the probation officer to the same persons as in an original proceeding and to counsel of record by certified mail addressed to the last known address of the person to be notified, or shall be personally served on such persons, not earlier than 30 days preceding the date to which the hearing was continued.

In the Supreme Court of the United States

OCTOBER TERM

No. 79-698

RICHARD W. BOTHMAN, as Chief Probation Officer,
Santa Clara County Superior Court,
Juvenile Division;
ex rel, PHILLIP B, a Minor,
Petitioner,

vs.

WARREN B. and PATRICIA B.,
Respondents.

Petitioner's Reply to Respondents' Response to Petition for Writ of Certiorari

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Petitioner's Reply to Respondents' Response to Petition for Writ of Certiorari

Petitioner served a copy of his petition for writ of certiorari on October 17, 1979. This Court requested opposition to that petition which was served by respondent on February 22, 1980. This reply to that response is submitted pursuant to Supreme Court Rule 24(4).

STATEMENT OF FACTS

A. Phillip's Life Expectancy

In their Statement of Facts respondents summarize Dr. Gathman's testimony as not knowing how long Phillip would live if the operation were not performed nor the

extent his life span will be increased if the operation is performed (Opposition 5). Dr. Gathman testified that since cardiac surgery has only been done for the past 25 years, there are no statistics on actual life expectancy; however, it is the consensus of the medical community that the life expectancy of those operated on is "significantly lengthened and approaches normal" (RT 29). Dr. Gathman explained that the statistics on the life expectancy of children suffering from Down's Syndrome are also incomplete because, prior to 1945 and the advent of antibiotics:

> "they had shortened life expectancy because they had died of infection. Now, that we've solved the infection problem, they are living longer. But, there are no very good statistics in terms of what their life expectancy is in 1977. It appears that if a Down's Syndrome child lives to five years of age, he is only six percent less likely than a normal child to live to forty years of age." (RT 28). "Once they get to Phillip's age, beyond ten, their life expectancy without heart disease may approach normal." (RT 27).

B. Parents' Reasons Not to Consent

In their response to the petition for certiorari, the parents list the chief concerns supporting their decision not to consent to the operation as:

> "1) the risks inherent in the operation; 2) the lack of medical expert unanimity on the necessity of the operation; 3) the danger that if Phillip's life expectancy is artificially extended, he would likely outlive them and therefore be without the guaranteed financial support or the supervision of his environment that only they can provide" (Opposition p. 7).

Asked when he had first encountered medical opinion that the surgery was too risky, Phillip's father testified that he

was relying on the doctor's testimony at the hearing (RT 109-110). There is no evidence in this record of a lack of medical expert unanimity on the *necessity* of this operation to prolong Phillip's life. The medical testimony at the hearing was unanimous that the operation should be performed if Phillip were an otherwise normal child.[1] Phillip's parents testified they had decided against this operation in 1973, before even the scope of the heart defect had been determined by cardiac catheterization (RT 92-93).

In addition to their fears for Phillip's future should he out-live them, his parents expressed additional reasons to support their decision against the operation. His father expressed the fear that if Phillip ever left a sheltered environment he would be victimized by others in our society (RT 97); "we went through the quality of life consideration. Life, in and of itself is not what it's all about." (RT 95); "there is no useful point in extending his life beyond the natural, by means of this operation." (RT 113); that it would be best for Phillip and the rest of the family if he were dead (RT 111). Phillip's mother expressed her reasons as: "his life is not going to change. He's basically doing what he'll be doing most of his life. He may become a little more active, but he's always going to be under shelter conditions. So, we are just extending the sameness of it all. . . . Retarded people don't have a sense of time, like you and I do." (RT 126).

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1. Dr. Gathman recommended the operation for Phillip (RT 21). Dr. French made no recommendation concerning Phillip, but testified that if Phillip was not afflicted with Down's Syndrome he would recommend the operation (RT 43; 39). Dr. Hartzel's recommendation against the operation was based solely on the fact that Phillip is mentally retarded.

REASONS FOR GRANTING THE WRIT

I. The Erroneous Application of Too High a Standard of Proof Denied Phillip the Equal Protection of the Law.

In response to this reason for granting the writ, Phillip's parents contend that the decision of the Court of Appeal of the State of California is "consistent with current state law." They cite three cases in which the California courts applied the "clear and convincing" standard[2] and three cases in which the California courts have applied the "preponderance of evidence" test.[3] Respondents conclude that the court order petitioner sought in the instant case is:

> "far closer in its severity to the types of disposition for which precedent establishes the 'clear and convincing' evidence test than to the mild disposition in such cases as *Christopher B., supra,* and *Lisa D., supra,* in which proof by preponderance was held sufficient." (Opposition, p. 11).

In re Robert T., supra, the Juvenile Court had removed the child from his parents' custody, *In re Terry D., supra,* the court had declared the parents' six children permanently free from parental control and custody, and, *In re B. G., supra,* involved a court order awarding custody of two minor children to their foster parents against the claim of their mother. The contemplated disposition in this case was an order of juvenile court allowing the operation to be performed. There was no request that Phillip be removed from the custody of his parents or that custody be awarded to a third party.

2. *In re Robert T.,* 61 Cal.App.3d 310, 132 Cal.Rptr. 5 (1976); *In re Terry D.,* 83 Cal.App.3d 890, 148 Cal.Rptr. 221 (1978) and *In re B. G.,* 11 Cal.3d 679, 114 Cal. Rptr. 444 (1974).

3. *In re Lisa D.,* 81 Cal.App.3d 192, 146 Cal.Rptr. 178 (1978); *In re Christopher B.,* 82 Cal.App.3d 608, 147 Cal.Rptr. 390 (1978); *In re Nichole B.,* 93 Cal.App.3d 974, 115 Cal.Rptr. 916 (1979).

We concur in respondent's observation that this case is not directly in point with any of the other cases referred to (Opposition, p. 11). Petitioner submits that the requested disposition here is akin to *In re Lisa D., supra,* where the juvenile court declared the children dependent wards of that court "their legal care, custody and control are removed from both of their natural parents . . . they're returned home on probation in the home of the father." [*In re Lisa D., supra,* 81 Cal.App.3d at 196, fn.3, 146 Cal.Rptr. at 181]; or *In re Christopher B., supra,* where the court declared the children dependent wards of the court but left them in their parents' custody while the court retained jurisdiction to supervise the proper maintenance of their environment [*In re Christopher B., supra,* 82 Cal.App.3d at 610, 612, 617; 147 Cal.Rptr. at 391, 392, 395]; and, *In re Nichole B., supra,* where the court declared the child a dependent ward of the court but left her in her mother's custody, under supervision of the County Welfare Department, upon the condition that the mother have no contact with the man who had assaulted the child [*In re Nichole B., supra,* 93 Cal.App.3d at 876, 882; 155 Cal.Rptr. at 920]. In each of these cases the court interfered to some extent with the parents' absolute custody and control over their minor child, but did not remove the child from the parents' control. "Consistent with current state law" the courts applied the preponderance standard.

Petitioner finds gruesome respondents' attempt to equate the extinguishment of the parent/child relationship by court decree with his effort to lengthen that relationship.[4]

4. Petitioner notes a strange dichotomy in respondents' argument. They refer to the operation as "non-life or death" but, on the same page, recognize that the order sought is "literally a 'once in a lifetime' matter." (Opposition, p. 11).

Respondents contend that the correct standard of proof would be "proof beyond a reasonable doubt." (Opposition, p. 11-12). It would be macabre to require the state to prove Phillip's needs outweigh his parents' wishes beyond a reasonable doubt. Fortunately, this Court has dismissed the applicability of that standard in proceedings of this type. *Compare, Addington v. Texas* (1979) 441 U.S. 418, 427-431.

II. The Admission of "Quality of Life" Evidence in the Juvenile Court Proceedings Denied Phillip Due Process of Law.

Respondents contend that our objection to the introduction of "quality of life" evidence is presented for the first time in this Court. In our opening brief on appeal in the California Court of Appeal we stated:

> "Phillip's parents explain that their refusal to consent to corrective surgery is based, at least in part, on the belief that it would not be in Phillip's best interests to prolong his life when there was no hope of improving its quality. The juvenile court, seemingly impressed by the depth and sincerity of the Becker's beliefs, opined that it would be inappropriate for a court to second guess them (RT 149). Appellants respectfully submit such considerations are outside the scope of those which can be adjudicated by the juvenile court.
>
> "Dr. French has only seen Phillip for the purposes of determining whether the operation to correct his heart defect can be done within reasonable risks (RT 44). Before recommending such surgery for a Down's child Dr. French conducts frequent meetings with the child's parents and others important to the child in

order to develop a background for the decision (RT 45-46). However, Dr. Gathman and Dr. French can only recommend surgery, the ultimate decision whether or not to perform it, rests with the surgeon (RT 46). Thus viewed, the issue before the juvenile court was whether to authorize this operation, if the doctors recommend it, or to deny Phillip the opportunity to be medically evaluated at the threshold by his parents' refusal to give their consent. To base that decision on the 'quality' of Phillip's life, or his degree of mental retardation, creates a suspect classification under the 14th Amendment. Compare *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1. *Burgdorf*: 'A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' under the Equal Protection Clause' 15 Santa Clara Lawyer 855.

> 'The right to life, liberty and the pursuit of happiness is not reserved to the healthy, able-bodied children and adults. It applies with even more force and intensity to the helpless, the physically handicapped, the mentally defective and the most unfortunate of children such as those at Willowbrook.' *In re D.* (1972) 70 Misc.2d 953; 355 N.Y.S. 2d 638, 651.

> Since this surgery is ordinarily done for normal children the juvenile court should not have considered the mental quality of Phillip's life in deciding whether consent for this surgery should be given if the doctors recommend it. See *Horan;* Euthanasia—Medical Treatment and the Mongoloid Child; Death as a Treatment of Choice? 27 Baylor Law Review 76." (Appellant's Opening Brief, pp. 13-14).

Perhaps respondents misconstrued the scope of our contention. Petitioner not only objects to the report of Dr. Hartzell, which was admitted into evidence (RT 86) and consid-

ered by the trial court in reaching its decision (RT 148), but also to the trial court's adoption of the parents' reasoning. Since his parents had made up their minds years before and based their objections primarily on quality of life considerations, Phillip was denied his due process right to a neutral and detached factfinder.[5] In deciding this case the trial court remarked,

> "The parents made the decision or maybe they didn't make the first decision. The doctors, I guess made the first decision. The parents disagree with it. Somebody else looked over their shoulder and this case resulted. And I'm being asked to make the decision. So, *I'm in effect sitting as an appellate court,* so to speak, over a series of decisions that had been made before they got here. *I'm reviewing other people's decisions,* one of the decision makers, being the natural parents. (RT 149)."
>
> * * *
>
> "And, it seems to me that if parents are doing everything that they can, and therefore, are in fact acting in the child's best interest, then, *it is not for me* or anybody else *to decide* that they can't do it.
>
> "I think there is no way to sustain the petition unless we decide that they don't have that right, someone else has the right to second-guess them. And what bothers me about it is that we have two days of testimony and witnesses all intelligent and educated people, and I'm impressed by the fact that nobody, including the judge in this case appeared to me to be any smarter than Mr. and Mrs. Becker. Who are they or *who am I to decide to say that they can't make the right decision*" (RT 153). (Emphases added.)

5. "We conclude that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiries should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission is satisfied." *Parham v. J.R.*, ... U.S. ....., 99 S.Ct. 2493, 2506 (1979).

By adopting the position that its role was that of appellate review of the parents' decision, the trier of fact effectively denied Phillip his right to a neutral and detached factfinder. This is particularly troublesome in this case since respondents' concerns supporting their decision against the operation (Opposition, p. 7) were all formulated after Dr. Gathman recommended the operation in 1977. Yet, the record shows that respondents had a preconceived opinion. They had refused a similar recommendation in 1973 and it "was never mentioned that we would be asked to reconsider our earlier decision as to whether or not the heart condition should be operated on" (RT 93).

CONCLUSION

Wherefore, on behalf of Phillip B., petitioner respectfully requests this Court issue a writ of certiorari to review the decision of California Court of Appeal, First Appellate District, Division Four in *"In re Phillip B."*, number 1/Civil No. 44291 in the files of that Court.

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